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IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-251

GARLAND M. FITZPATRICK, *et al.*,

*Petitioners,*

v.

FREDERICK BITZER, *et al.*

## BRIEF FOR THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

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## INTEREST OF AMICI CURIAE*

The Lawyers Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy; its Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The National Association for the Advancement of Col-

* This brief is filed, pursuant to Rule 42(2), with the consent of the parties.

ored People (NAACP) is a non-profit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens.

The Mexican American Legal Defense and Educational Fund was established in 1968. Its primary objective is to secure the civil rights of Mexican Americans through litigation and education.

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members dedicated to protecting the civil liberties of all persons including, *inter alia,* the right of all persons to equal treatment under the law.

The issue in this case is whether, consistent with the Eleventh Amendment, state employees may secure monetary relief in private actions when they have suffered discrimination in violation of Title VII of the Civil Rights Act of 1964. Each of the *amici* has a vital interest in the resolution of this issue.

This brief is filed to provide the Court with the views of *amici,* refined through extensive litigation under Title VII and the Fourteenth Amendment, that the Eleventh Amendment is not a barrier to the private cause of action against states for complete relief from prior discrimination, including backpay, created by Congress in the 1972 amendments to Title VII.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress amended Title VII to extend its protections against discrimination to employees of state and local governments. With unmistakable clarity, Congress evinced an intention to create two separate mechanisms for



enforcement of these protections: (1) a suit by the Attorney General to recover injunctive relief and backpay for employees who have suffered unlawful discrimination; and (2) a suit by the injured employees themselves, if the Attorney General does not act within 180 days of the filing of a charge, to recover that same relief for their own benefit.[1]

No one disputes Congress' power to impose the *substantive* prohibitions of Title VII upon the states. The 1972 amendments, as Congress explained in enacting them, were an exercise of the power conferred by Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[2]

Nor does anyone dispute Congress' authority to authorize suits in federal court by the Attorney General to recover backpay on behalf of discriminatees. "[S]uits by the United States against a State are not barred by the Constitution." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285-286 (1973) (recognizing Congress' power to authorize suits by the Secretary of Labor to recover unpaid minimum wages and unpaid overtime compensation withheld by states from hospital and school employees in violation of the Fair Labor Standards Act).[3]

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[1] Sections 706(f)(1) and (g), 42 U.S.C. §2000e-5(f)(1) and (g). See also "Legislative History of the Equal Employment Opportunity Act of 1972," published by the Senate Committee on Labor and Public Welfare (hereinafter "Leg. Hist."), pp. 1815-16, 1847. Congress additionally provided that if the employees themselves bring the suit, and are successful, they may be awarded attorneys fees. Section 706(g), 42 U.S.C. §2000e-5(g).

[2] Leg. Hist. 79, 420, 1173-74.

[3] See also *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965); *United States* v. *Texas*, 143 U.S. 621, 643-646 (1892); *Brennan* v. *Iowa*, 494 F.2d 100, 103 (8th Cir. 1974), cert. denied 421 U.S. 1015 (1975); *Dunlop* v. *State of New Jersey*, 522 F.2d 504, 515-516 (3rd Cir. 1975). And see the decision below, *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 570 (2nd Cir. 1975).

But the Eleventh Amendment has been invoked, and construed by the court below, to invalidate that portion of the 1972 amendments by which Congress created a *private* cause of action for backpay against state governments (albeit not, presumably, against local governments which do not enjoy the protection of the Eleventh Amendment[4]). The practical consequences of that ruling, if upheld, are awesome.

There are millions of state employees,[5] and Congress found that employment discrimination against them is

[4] It is hornbook law that a "suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment." Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2nd Ed. 1973). See, e.g., *County of Lincoln* v. *Luning,* 133 U.S. 529, 530 (1890); *Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636 (1911); *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573, 579 (1946); *Edelman* v. *Jordan,* 415 U.S. 651, 667 n. 12 (1974); *Incarcerated Men of Allen County Jail* v. *Fair,* 507 F.2d 281, 287 (6th Cir. 1974); *Hander* v. *San Jacinto Junior College,* 519 F.2d 273, 279 (5th Cir. 1975); *Singer* v. *Mahoning County Board of Mental Retard.,* 519 F.2d 748, 749 (6th Cir. 1975); *Burt* v. *Board of Trustees of Edgefield Cty. Sch. D.,* 521 F.2d 1201, 1205 (4th Cir. 1975); *Hostrop* v. *Bd. of Jr. College Dist. No. 515,* 523 F.2d 569, 577 n. 3 (7th Cir. 1975); *Hutchison* v. *Lake Oswego School District,* F.2d , 11 FEP Cases 161, 165 (9th Cir. 1975). In the instant case, the court below concluded that the State Employees' Retirement Commission is the "alter ego" of the State, and thus enjoys whatever immunity the Eleventh Amendment provides the State of Connecticut (519 F.2d at 564-565). Petitioners have not sought review of that holding, and accordingly our brief assumes *arguendo* that respondents are "the state" for Eleventh Amendment purposes.

[5] Congress found that there are more than ten million employees of state and local governments. Leg. Hist. 77, 418. The congressional data does not indicate how much of the total represents employees of the states, or of agencies which are the "alter ego" of the states and thus share the states' Eleventh Amendment immunity, but the figure surely is in the millions.



"more pervasive than in the private sector."[6] It is a central purpose of Title VII "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975), a purpose which in most cases cannot be achieved without backpay, *Id.* at 418-421. It is also the purpose of Title VII to prompt employers to discard their discriminatory practices, a purpose with which backpay has "an obvious connection," *Id.* at 417.[7]

Congress, deeming these considerations equally applicable to state employers, made backpay available against the states. Congress also made the judgment, given the multitude of potential claims by state employees, *not* to make the Attorney General the *sole* prosecutor of Title VII claims on behalf of such employees. Declaring that preservation of the discriminatee's cause of action was "paramount,"[7a]

[6] Leg. Hist. 77-78, 418-419. Congress relied in part upon a report of the U.S. Commission on Civil Rights, *For All the People . . . By All the People* (1969). The report "examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South" (Leg. Hist. 77). The House Committee summarized the report's findings as follows (*ibid.*):

> The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities.

[7] "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'." *Id.* at 417-418, quoting *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 379 (8th Cir. 1973).

[7a] Leg. Hist. 1847.

Congress expressly conferred a private cause of action whenever the Attorney General has not sued within 180 days of the filing of an employee's charge.

Invalidation of the private cause of action for backpay would mean either that Title VII's objectives would go partially unfulfilled, or that Congress would have to appropriate the additional sums necessary to enable the Attorney General to institute actions wherever a valid claim of discrimination existed. Whether the Eleventh Amendment subjects Congress to this Hobson's choice is the issue posed by this case.

We show in this brief that Title VII's private cause of action for backpay does *not* contravene the Eleventh Amendment. Our showing proceeds upon the following analysis:

Immunity from suit is an attribute of sovereignty. While the states retained their sovereignty over most matters upon entering the Union, they yielded their sovereignty to the extent that the Constitution conferred powers upon the national government—powers which were declared to be "supreme".

As originally adopted, however, Article III, Section 2 of the Constitution—which defined the federal judicial power—encroached upon state sovereignty in greater respects than did the remainder of the document. For in addition to creating judicial power over all federal questions—a power which was understood to embrace federal question claims against the states, and which excited no controversy as it was wholly consistent with the cession of sovereignty made by the states in joining the Union—it also created judicial power over *state law* "controversies . . . between a State and citizens of another State . . . and between a State . . . and foreign states, citizens or subjects." This provision *did* excite controversy, for read literally it trespassed upon the sovereignty retained by the states: the states would become suable in federal court upon "state law" claims which they had not consented to entertain in their own courts.



In urging ratification of the Constitution, supporters assured the states that the "diversity" clause was not to be read literally: it was not intended to depart from the general principle that a sovereign is immune from suit absent consent, and thus it would allow "state law" suits against states only where not inconsistent with their sovereignty, i.e., where they had consented to suit. That promise proved short-lived, however, for in *Chisholm* v. *Georgia,* 2 U.S. 419 (1793), four of the Court's five justices construed the diversity clause literally, to confer federal judicial power over *any* claim against a state by a non-citizen of that state. Only the lone dissenter, Justice Iredell, would have confined the diversity clause to state-law claims upon which the states had consented to suit. (Significantly, Justice Iredell recognized and approved Congress' power to create federal jurisdiction over *federal question* claims against the states).

The Eleventh Amendment was a reaction to *Chisholm.* It was designed to reinstate the original understanding of the diversity clause, to which only Justice Iredell had adhered in *Chisholm.* The wording of the Amendment—which speaks in diversity terms—is no accident; it defines the metes and bounds of the alteration which its framers sought to accomplish. There is no historical evidence that the Amendment was intended to withdraw federal judicial power over federal question claims against states, and indeed such a withdrawal would have been wholly inconsistent with the Amendment's objective: to restore the states' "sovereign" immunity from suit. The framers of the Amendment would surely have chosen different words if their intention had been to preclude *all* suits against states, for they were aware that all who had articulated the "original understanding" which they sought to reinstate—including Justice Iredell—had approved the existence of federal

judicial power over federal question claims against the states.

In *Cohens* v. *Virginia,* 19 U.S. 264 (1821), Chief Justice Marshall confirmed that the Eleventh Amendment had *not* withdrawn federal judicial power over federal question claims against states. But 69 years later, in *Hans* v. *Louisiana,* 134 U.S. 1 (1890), the Court declared otherwise. Although the *Hans* Court might have decided the case before it on narrower grounds, it announced that states could *never* be sued in federal court without their consent. This conclusion was premised upon a wholly erroneous reading of the historical and judicial precedents. This Court has subsequently recognized that, whatever the correctness of the holding in *Hans* on the narrow issue presented there, its broad declaration of universal immunity will not be followed when it collides with an express decision by Congress, in exercising the sovereign powers of the *national* government, to confer federal jurisdiction over individual causes of action against the states. *Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1963); *Employees* v. *Department of Public Health,* 411 U.S. 279 (1973).

*Parden* and *Employees* involved the Commerce Clause. That clause does not authorize Congress to regulate states *per se,* but only to regulate interstate commerce. Accordingly, this Court recognized that Congress could make the states susceptible to suits under the Commerce Clause only as the states voluntarily brought themselves within the ambit of the commerce power by engaging in interstate commerce. The instant case, by contrast, involves an exercise of congressional power pursuant to Section 5 of the Fourteenth Amendment. As that Amendment empowers Congress to regulate the states directly, there is no need here, as there was in the commerce cases, to find a *subsequent* waiver of immunity by the states' electing to bring themselves within the ambit of congressional power: the states are by definition within the ambit of Congress' power to enforce the



Fourteenth Amendment. Their sovereignty in this area was yielded up to the national government when the Amendment was adopted, and with it the sovereign's right to immunity from suit.

Of course, that the states have ceded Congress the *power* to confer federal jurisdiction over federal question claims against them does not mean that the federal courts automatically have jurisdiction to entertain such claims. The lower federal courts have only such jurisdiction as Congress opts to confer upon them. Congress, sensitive to the extraordinary cession of state sovereignty implicit in our federal scheme, has treaded warily in conferring jurisdiction over individual causes of action against states, and this Court has demanded clear evidence of Congressional intent before concluding that the states have been made suable.

Such evidence exists in the case of the 1972 Amendments to Title VII. Congress decided that employee actions against states should be available, in which employees could recover all appropriate relief, including backpay.

The foregoing analysis, although valid for Congress' exercise of *any* of its enumerated powers, gains additional strength in this case because the cause of action was created pursuant to the Fourteenth Amendment. Even if the Eleventh Amendment *had* withdrawn federal judicial power over all claims against states under the Constitution as it *then* existed, the Fourteenth Amendment, adopted 70 years later, mandated Congress to fashion remedial schemes "appropriate" to enforce the obligations which that Amendment imposed directly upon the states.

## ARGUMENT

**IN ESTABLISHING FEDERAL JURISDICTION OVER EMPLOYEE ACTIONS AGAINST STATES FOR COMPLETE RELIEF, INCLUDING BACKPAY, FOR VIOLATIONS OF TITLE VII, CONGRESS PROCEEDED IN FULL CONFORMITY WITH THE CONSTITUTION.**

**A. Congress Has Power To Confer Federal Jurisdiction over Individual "Federal Question" Suits Against States.**

In 1907, Mr. Justice Holmes, writing for the Court, succinctly stated the source of the sovereign's immunity from suit. *Kawanakoa* v. *Polyblank,* 205 U.S. 349, 353 (1907):

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no right as against the authority that makes the law on which the right depends.

In the instant case, the State of Connecticut asserts that it is immune from a suit which Congress has authorized. That assertion of immunity obviously does not fit traditional notions of sovereign immunity, for here the state is not "the authority that [made] the law on which the right depends." Congress made the law; it acted within its power in doing so; and the Constitution declares that Congress' decision is "the supreme law of the land; . . . anything in the constitution or laws of any state to the contrary notwithstanding." Art. VI, cl. 2.

Connecticut's lack of "sovereignty" with respect to the subject matter of this suit is an outgrowth of our federal system, which creates bifurcated sovereignties. While the states of course remain sovereign with respect to all matters not committed to the control of the national government, they are not and cannot be "sovereign" in those areas where the federal power is "supreme." By entering the Union, and accepting the Constitution, the states yielded up their sovereignty to this extent. "[E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." *Ex parte Virginia,* 100 U.S. 339, 346 (1880).



The decision below thus does not vindicate Connecticut's "sovereignty," but rather deprives the federal government of a portion of *its* sovereignty. What the court below has done, in the name of the Constitution, is to reverse the Supremacy Clause. It has hamstrung Congress in the choice of means for implementing powers which Congress indisputably possesses, and conditioned Congress' ability to utilize the means which it prefers—and prefers for good reasons[8]—upon the states' consenting to that use.

Of course, a constitution could be written which commanded such incongruous results. But as we show in this brief, nothing in *our* Constitution commands them.

***1. Article III, as originally adopted, conferred federal judicial power over federal question claims against the states, and the Eleventh Amendment did not withdraw that power.***

Article III, Section 2 of the Constitution—which defines the federal judicial power—differs in an important respect from all other provisions of the Constitution. The other provisions delineate clear lines between those matters which remain the states' domain, and those which are ceded up to the federal government. But Article III, Section 2, obliterates those lines to some extent; in addition to conferring federal judicial power over "federal" questions, it confers such power over "state law" questions where there is diversity of citizenship. And its literal language appears to authorize suits against states by non-citizens without exception,[9] thus wholly eradicating the states' immunity from suit in areas of "state law" where their sovereignty is retained.

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[8] Not only does Congress' allowance of employee suits lessen the sums which must be appropriated for the Attorney General, but it also reflects Congress' judgment that employee enforcement is critical to the accomplishment of Title VII's objectives. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975). See also *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240, 263 (1975).

[9] Article III, Section 2 extends the judicial power to "controversies . . . between a State and citizens of another State . . . and between a State, and foreign states, citizens, or subjects."

It is thus not suprising that while the "federal question" portion of the Article excited no concern among the state legislatures during the ratification process, the "diversity" portion—particularly that relating to the suability of states —was a subject of great discussion. The concern was not merely a theoretical one about the nature of the states' retained sovereignty, but a very practical one as well.[10] The war of revolution had drained the resources of the colonies. In order to finance the war, the colonies had borrowed heavily. They entered the Union with debts they knew they could not meet. So long as they remained independent entities this was not a problem, for they retained the power to deny access to their courts to disappointed creditors. But the diversity jurisdiction in the proposed Constitution, they feared, would enable foreign creditors, and creditors from other states, to secure judicial awards compelling payment.

It was to quiet these fears that Alexander Hamilton, in Federalist No. 81, "digress[ed]" to discuss "a supposition which has excited some alarm upon very mistaken grounds":

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the

[10] This concern is described in *Cohens* v. *Virginia*, 19 U.S. 264, 406-407 (1821); *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 276, n. 1 (1959).



> convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.
>
> To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[11]

As is apparent, Hamilton was *not* saying that the states could *never* be sued in the federal courts. He was saying that immunity from suit was "in the nature of sovereignty," and thus except as to those matters upon which the Constitution "produce[d] an alienation of State sovereignty" the states remained immune. Because the Constitution did not take from the states "the privilege of paying their own debts in their own way," they retained their sovereignty on this

[11] Federalist No. 81 (Hamilton), in *The Federalist* (Modern Library Ed.), pp. 529-530 (emphasis in original).

matter, and the fear that they could be sued in federal court to compel payment of their debts was unwarranted.

In the text quoted above, Hamilton indicated that the "circumstances which are necessary to produce an alienation of State sovereignty"—and which, implicitly, would withdraw the states' immunity from suit—had been "discussed in considering the article of taxation." The reference was to Federalist No. 32, where he had said:

> But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. (*Id.* at 194; emphasis in original)

Hamilton's promise that the states could not be sued on their debts proved short-lived. In *Chisholm* v. *Georgia*, 2 U.S. 419 (1793), four of the Court's five justices declared that a state law assumpsit action by a creditor seeking to compel the state's payment of a debt was indeed within the federal jurisdiction, a holding which they premised upon the literal language of the diversity clause. Justice Iredell dissented, and his dissent is important to an understanding of what the Eleventh Amendment was later adopted to accomplish.

Justice Iredell fully recognized that Congress could make the states amenable to suits in federal court on federal question claims, a power which he deemed relevant "to the



execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself)," *id.* at 432. These "special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy," *id.* at 435, were not the cause of his concern. As to them, he observed only that he believed an act of Congress was necessary to confer jurisdiction to entertain such suits, a course which he did not understand Congress to have yet taken, *id.* at 448-449.

Rather, Justice Iredell's concern was with the intrusion upon state sovereignty which the majority drew from the "peculiar" feature of Article III, Section 2: that after conferring federal question jurisdiction it "also goes further" and confers diversity jurisdiction as well, *id.* at 435-436. In his view, analysis of the extent to which states were suable under the *diversity* jurisdiction had to begin with an understanding of the respective sovereignties of the national and state governments, *id.* at 435:

> Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course, the part not surrendered must remain as it did before.

But here was the rub: if under the diversity jurisdiction a state could be sued in federal court on state law grounds, it would lose the sovereign's immunity from suit in those very areas where the Constitution left the states sovereign.

Could this have been the framers' intention? Justice Iredell thought not. He believed that the diversity clause made the states suable only where, under the common law, the sovereign could be sued (i.e., by its consent) (*id.* at 436-446). By this construction, Justice Iredell believed that the language of the diversity clause could be given effect without abrogating the states' retained sovereignty.

The majority's holding in *Chisholm* sent shock tremors through the state legislatures. The Eleventh Amendment was proposed by an overwhelming vote at the next session of Congress, and was ratified by the states with "vehement speed."[12] Its wording is the strongest evidence that its purpose was narrow: to reinstate the framers' original intent with respect to the *diversity* clause (i.e., to maintain the states' immunity with respect to matters within their retained sovereignty), and *not* to withdraw federal judicial power over *federal* claims against states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

This language, of course, tracks the diversity clause of Article III, Section 2, and it defines the metes and bounds of the alteration which its authors sought to accomplish. The failure to prohibit *all* suits against states cannot be deemed an oversight. Its authors surely knew that both Hamilton and Justice Iredell had recognized the availability of federal question suits against states, and there is no evidence that the Amendment was intended to make the states immune from suit where they were not sovereign. Had its authors indeed had such an intention, it is difficult to believe that they would have chosen words so ill-suited to the task.

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[12] *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949) (dissenting opinion of Mr. Justice Frankfurter).



That the purpose of the Eleventh Amendment was confined to the diversity clause was soon confirmed by Chief Justice Marshall. In *Cohens* v. *Virginia,* 19 U.S. 264, 380-383 (1821), he described the original intention of the drafters of Article III, Section 2, an intention which he did not find overturned by the Eleventh Amendment:

> "The counsel for the [state] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.
>
> This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.
>
> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.
>
> If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to

act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these the sovereignty of the states is surrendered in many instances where the sur-



render can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.

See also, *id.* at 412.

**2. *Whatever the correctness of the decision in Hans* v. *Louisiana, its broad declaration that Congress lacks power to confer federal jurisdiction over federal question suits against states is unfaithful to the historical and judicial precedents.***

Congress first conferred general federal question jurisdiction upon the lower federal courts in 1875.[18] It was inevitable that cases would soon come to the Court involving federal claims against states. What was not inevitable—indeed,

[18] *Powell* v. *McCormack,* 395 U.S. 486, 515-516 (1969).

what was an extraordinary coincidence—was that the first cases to arrive would look so much like *Chisholm*.

*Hans* v. *Louisiana*, 134 U.S. 1 (1890), and its companion case, *North Carolina* v. *Temple*, 134 U.S. 22 (1890), were (like *Chisholm*) suits to compel states to honor their debt obligations. But, unlike *Chisholm*, they were federal question suits, the creditors contending that the states had impaired the obligation of their contracts by legislating exemption from their debts. The similarity to *Chisholm* clearly impressed the *Hans* Court, which repeatedly referred to the historical evidence that resistance to the enforceability of state debts was the immediate objective of the Eleventh Amendment, 134 U.S. at 12-13, 16.[14]

The Court recognized that the Eleventh Amendment could not preclude the suit, for the creditor was a citizen of Louisiana, *id*. at 10:

> In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the 11th Amendment, inasmuch as that Amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. *It is true, the Amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable*. . . . (emphasis added).

But the Court found two "other reasons." One, which would have been entirely sufficient to dispose of the case, was that Congress had not conferred jurisdiction upon the

[14] It was not until a decade after adoption of the Eleventh Amendment that the Court ruled that the impairment of obligation of contract clause "extends to contracts to which a state is a party, as well as to contracts between individuals." *Fletcher* v. *Peck*, 10 U.S. 87 (1810), as characterized in *New Jersey* v. *Wilson*, 11 U.S. 164, 166 (1812). Thus, the authors of the Eleventh Amendment probably did not anticipate that state debts might still be reachable under the federal question clause of Article III.



lower federal courts to entertain the suit, *id*. at 18.[15] But the Court did not rest with that. It flatly declared that Congress was without power to create such a cause of action, for Article III, Section 2, as originally adopted did not include, within the federal judicial power, federal question claims against states, *id*., at 10-18.

This declaration proceeded from a misunderstanding of the relevant historical and judicial precedents. The Court quoted Hamilton's discussion in Federalist No. 81, and Justice Iredell's analysis in *Chisholm*, and drew from these the erroneous lesson that *all* suits against states were forbidden—a result which the *Hans* court presumed to have been intended by the framers of the original Constitution, frustrated by *Chisholm*, and restored in spirit by the Eleventh Amendment, *id*. at 13-14:

> The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that 'the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects.' It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal courts to entertain suits against a State brought by citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm* v. *Georgia; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things,*

[15] The Court reasoned that as the statute conferring federal question jurisdiction invested the federal courts with jurisdiction "concurrent with the courts of the several States," and as the "state courts have no power to entertain suits by individuals against a State without its consent," Congress had not intended to confer jurisdiction over actions against states, *id*. at 18.

> *the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided* (emphasis added).

This passage, on its face, discloses the slip in the Court's analysis. The Court recognized that the "obnoxious clause" was the diversity clause, that it was *this* clause which *Chisholm* had misconstrued by adherence to the "mere letter," and that the Eleventh Amendment was adopted to reverse *Chisholm*. Yet from these correct premises the Court drew the *non-sequitur* that that Amendment narrowed the scope of the federal question clause as well.

The Court appears to have overlooked entirely that both Hamilton and Justice Iredell recognized and approved the suability of states on federal question grounds. The Court did *not* overlook, however, that Chief Justice Marshall had said the same in *Cohens*. The latter observation was "conceded" to support the plaintiff in *Hans*, but "the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion," *id.* at 20.

In sum, the *Hans* court construed the Constitution to preclude federal question claims against the states only by misreading the relevant historical and judicial sources, and by expressly disagreeing with Chief Justice Marshall's more contemporaneous reading of the framers' intent. Moreover, the *Hans* opinion, which contains extensive passages about state sovereignty, takes no account of the fact that on federal questions, where the states have ceded power to the "supreme" federal government, the states are *not* sovereign. Considering the weakness of *Hans*' foundations, it is not surprising that *Hans*' broad declaration collapsed upon first impact with a federal question suit against a state brought pursuant to a congressional conferral of jurisdiction to entertain such suits.



### 3. *This Court has recognized the inapplicability of Hans where Congress has expressly conferred jurisdiction to entertain federal question suits against states.*

It was not until 1963 that the collision came. *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1963), was a suit brought under the Federal Employers' Liability Act, a statute giving railroad employees a federal cause of action for damages suffered in the course of their employment. Following the passage of the FELA, the State of Alabama acquired ownership of a small railroad. An employee of that railroad, injured in the course of his employment, brought suit for damages under the FELA. The State of Alabama asserted that the railroad was "an agency of the State and the State had not waived its sovereign immunity from suit." 377 U.S. at 185.

The Court noted the legal issues, and their novelty, in these words (*id.* at 187):

> Here, for the first time in this Court a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a state to suit in these circumstances? (2) Did it have the power to do so, as against the state's claim of immunity?

Answering the first question, the Court concluded that Congress in enacting the FELA intended its provisions to be applicable to all railroads, "whether they are state owned or privately owned." (*id.* at 188).

The Court then turned to the second issue: whether Congress has power, consistent with the Eleventh Amendment, to create a federal cause of action for damages against a state. The Court began by rejecting *Hans* as controlling authority, explaining that, however broadly worded the *Hans* opinion, it must be understood in the context in which

it arose: "Such a suit on state debt obligations without the State's consent was precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity of the *Hans* case were directed," 377 U.S. at 187. The Court found the suit before it "distinctly unlike *Hans*," *id.* at 186, and declared that the Eleventh Amendment could not stand as a barrier to Congress' creating causes of action to implement the powers which the states had yielded up in adopting the Constitution:

> Respondents contend that Congress is without power, in view of the immunity doctrine, thus to subject a state to suit. We disagree. Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce. While a state's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty' . . ., the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. . . . By empowering Congress to regulate commerce, then, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. (*Id.* at pp. 190-192).

As the *Parden* court recognized, the extent to which the Commerce Clause results in a lifting of state sovereignty depends upon the extent to which Congress chooses to exercise its power, granted by that clause, to regulate interstate commerce. A state, pursuant to powers otherwise reserved to it, may regulate its internal commerce, or participate in interstate commerce, where such activities do not conflict with an exercise of the commerce power given to Congress. But, where such a conflict exists, "the act of



Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons* v. *Ogden,* 22 U.S. 1, 211 (1824). Thus, this Court in *Parden* concluded that Congress may in the proper exercise of its power to regulate commerce subject the states to suit where they run afoul of that regulation without infringing upon their sovereignty. The corollary to this proposition is, as the Court recognized, that a state may avoid subjecting itself to such suits by refraining from participation in the sphere where Congress has exercised its supreme power, 377 U.S. at 196:

> [W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.

Accordingly, on the facts of *Parden,* the Court concluded, *id.* at 192:

> Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the rights to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

On the proposition critical here, the Court was unanimous, for the dissenters in *Parden* agreed "that it is within the power of Congress to condition a State's permit to en-

gage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198. The disagreement of the dissenters was with the Court's conclusion that Congress in enacting the Federal Employers' Liability Act had intended to subject states so engaged to such suits.

That Congress may pursuant to its commerce power subject states to suits in federal courts was again the foundation of this Court's analysis in *Employees* v. *Department of Public Health,* 411 U.S. 279 (1973). The Court dealt there with the 1966 amendments to the Fair Labor Standards Act, by which Congress made the substantive provisions of the FLSA applicable to state hospital and educational employees. The Court had already upheld the constitutionality of the substantive coverage, *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), but had reserved the question whether individuals could sue to recover unpaid wages, *id.* at 199-200.

In *Employees,* the Court stated the issue as "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." 411 U.S. at 283. The Court concluded "that Congress did not lift the sovereignty immunity of the States under the FLSA," *id.* at 285, because "we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the federal courts," and it "would be . . . surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away," *ibid.*[18]

[18] This was also the conclusion in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), an action under 42 U.S.C. §1983, the Court finding that "the threshold fact of congressional authorization to sue a class of defendants which literally include States is wholly absent," *id.* at 672.



But the Court recognized in *Employees* that Congress has *power* to lift the states' immunity, *id.* at 286-287:

> The Solicitor General, as *amicus curiae,* argues that *Hans* v. *Louisiana,* 134 U.S. 1, should not be construed to apply to the present cause, his theory being that in *Hans* the suit was one to collect on coupons attaching to state bonds, while in the instant case the suit is a cause of action created by Congress and contained in §16(b) of the Act. It is true that, as the Court said in *Parden,* 'the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce'. 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the states and putting the states on the same footing as other employers is not clear* (emphasis added).

We show in the next section that here the congressional purpose to put the states "on the same footing as other employers" is unmistakable. Thus, while the states are in general "sovereign" in their dealings with their own employees, here Congress has "lifted their sovereignty" to the extent that Title VII imposes obligations which must be met, and, as part of that "lifting", has made the states suable by aggrieved employees for violations of those obligations. Before turning to the evidence of that congressional decision, however, it is important to note a significant difference in the analysis required here from that in *Parden* and *Employees.* The source of the congressional power here is the Fourteenth Amendment. Whereas the Commerce Clause does not authorize Congress to regulate states *per se,* but only to regulate interstate commerce, the Fourteenth Amendment *does* authorize Congress to regulate the states directly. Only as a state might elect to engage in interstate commerce would it come within the ambit of the congressional power to create private "commerce" causes of action against it. But the

Fourteenth Amendment is different, for the states brought themselves within its ambit, "consented" to Congress' creating a private cause of action against them pursuant to that Amendment, when the Amendment was added to the Constitution. As the Court explained in *Ex Parte Virginia,* 100 U.S. at 346:

> "The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact."

It is thus not necessary here, as it was in *Parden,* to find a *subsequent* waiver of immunity by the states' electing to bring themselves within the ambit of congressional power. The states are by definition within the sphere of Congress' power to enforce the Fourteenth Amendment.

**B. Congress Clearly Decided to Confer Federal Jurisdiction Over Employee Actions Against States for Complete Relief, Including Backpay, for Violations of Title VII.**

Of course, that the states have ceded to Congress the *power* to create private causes of action against them does not mean that the federal courts may take jurisdiction of all "federal question" actions against states. The lower federal courts have only such jurisdiction as Congress opts to confer upon them. Congress, sensitive to the extraordinary cession of state sovereignty implicit in our federal scheme, has treaded warily in conferring federal court jurisdiction over private actions against states. See, e.g., *Monroe* v. *Pape,* 365 U.S. 187-192 (1961); *Edelman* v. *Jordan,* 415 U.S. 651, 675-677 (1974). This Court accordingly has demanded clear evidence of a congressional decision to authorize private suits against states before concluding that Congress



has made the fateful judgment to "lift" the states' immunity. *Employees, supra,* 411 U.S. at 285-286; *Edelman, supra,* 415 U.S. at 674-677. See also *Parden, supra,* 377 U.S. at 198-199 (dissenting opinion).

Such clear evidence exists in the case of the 1972 amendments to Title VII. Congress not only amended the definition of "employer" to add states and local governments, but also amended the enforcement provisions, expressly making governmental employers suable by the Attorney General or, if he does not act within 180 days of the filing of a charge, by aggrieved employees.[19] In a section-by-section analysis of the bill, the floor managers in the Senate (Senators Williams and Javits) explained that the conferees had not stopped with empowering the Attorney General to sue, but had also allowed "the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution," because "the individual's rights to redress are paramount under the provisions of Title VII" and thus "it is necessary that all avenues be left open for quick and effective relief."[20]

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[19] As the Conference Report explained (S. Rep. No. 92-681, 92d Cong. 2d Sess. 17-18 (1972); H. Rep. No. 92-899, 92d Cong. 2d Sess. 17-18 (1972)):

> The conferees adopted a provision allowing the [Equal Employment Opportunity] Commission, or the Attorney General in a case against a state or local government agency, to bring an action in Federal district courts if the Commission is unable to secure from the respondent 'a conciliation agreement acceptable to the Commission.' Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation agreement to which such aggrieved party is not a signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.

[20] Section-By-Section Analysis of H.R. 1746, reprinted in *Legislative History of the Equal Employment Opportunity Act* of 1972, published by the Senate Committee on Labor and Public Welfare, p. 1847.

The evidence of Congressional intent here is, of course, markedly different from that found insufficient in *Employees*. Although Congress in the 1966 amendments to FLSA had amended the definition of "employer" to include state governments, it had not changed the enforcement provisions of the statute. The Court, noting that there was "not a word in the history of the 1966 amendments to indicate a purpose of Congress" to permit private actions against states, was unwilling to infer that Congress had "silently" lifted the states' immunity from suit. 411 U.S. at 285. Here, by contrast, the evidence of congressional intent to permit private actions is explicit. Furthermore, this Court relied in *Employees* upon two additional considerations not present here: (1) that "private enforcement of the Act was not a paramount objective," *id.* at 286[21]; and (2) that private actions under the FLSA could yield twice the recovery of suits by the Secretary of Labor: "it is one thing, as in *Parden,* to make a state employee whole; it is quite another to let him recover double against a state . . . . [W]e are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly," *id.* at 286.[22]

Similarly, this case is altogether different from *Edelman* v. *Jordan* (*supra,* n. 18), where the Court found "wholly absent" the "threshold fact of congressional authorization to

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[21] In contrast, Congress created under Title VII a private cause of action precisely because the private rights were deemed "paramount," Leg. Hist. 1847.

[22] Under Title VII, by contrast, the remedies are the same whether suit is brought by the Attorney General or by aggrieved employees, except that the latter may recover attorneys fees. Whether attorneys fees are even a concern of the Eleventh Amendment is a question on which a conflict of circuits exist (the court below holding that they are not) and is the subject of the cross-petition in this case, No. 75-283. We intend to file an *amici curiae* brief in No. 75-283, arguing that awards of attorneys fees are never precluded by the Eleventh Amendment. Rather than incorporating that argument into the instant brief, we have opted to await the filing of the cross-petitioner's brief, so that our discussion can be responsive to the cross-petitioner's contentions.



sue a class of defendants which literally includes States," 415 U.S. at 672.

In sum, the Eleventh Amendment imposes no barrier to private actions for backpay where, as here, (1) Congress has acted within its enumerated powers in imposing a *substantive* obligation, (2) Congress has unmistakably created a private cause of action in the federal courts to recover remedies from the states for violating that obligation, and (3) the states are within the ambit of the congressional regulatory power (either directly, as under the Fourteenth Amendment, or by voluntarily bringing themselves within it, as in the commerce cases).

### C. The Foregoing Analysis Gains Additional Strength in This Case Because the Cause of Action Was Created Pursuant to the Fourteenth Amendment.

If we are right that Congress is empowered to create a private cause of action against states in effectuation of *any* of Congress' enumerated powers, there is no need to examine the special considerations which arise from the fact that the Fourteenth Amendment was adopted after the Eleventh, and that the cause of action involved here was created by Congress in the exercise of the authority conferred upon it by Section 5 of the Fourteenth Amendment. But these special considerations would compel the conclusion that the Eleventh Amendment is inapplicable here, even if the Court disagreed with our broader contention.

#### 1. *The question whether the later enactment of the Fourteenth Amendment brings it outside the scope of the Eleventh has been recognized, but not decided, in prior cases.*

The question whether the Eleventh Amendment is applicable to suits for vindication of the Fourteenth was first presented in *Ex Parte Young,* 209 U.S. 123 (1908). The Court noted the question, but expressly refrained from deciding it (*Id.* at 150):

> "We think that, whatever the rights of complainants may be, they are largely founded upon that [the Four-

teenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment."

Instead, the Court accorded complainants the relief they sought by holding the Eleventh Amendment inapplicable to suits for injunctive relief against state officers.

Remarkably, neither this Court nor any lower court had occasion to discuss the question which *Ex parte Young* left open until *Edelman* v. *Jordan,* 415 U.S. 651 (1974). In *Edelman,* Mr. Justice Marshall observed, in dissent, *id.* at 694, n. 2:

> "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an amicus in this case."

However, some lower courts, including the court below (519 F.2d at 571), have construed the Court's opinion in *Edelman* as indeed determining the issue.[23] They point to the Court's disapproval[24] of three prior decisions[25] in which

[23] *Jordan* v. *Gilligan,* 500 F.2d 701, 709 (6th Cir. 1974); *Skehan* v. *Board of Trustees of Bloomsburg State Col.,* 501 F.2d 31, 42-43, n. 7 (3rd Cir. 1974).

[24] 415 U.S. at 670-671, and n. 13 thereat.

[25] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), affirming 270 F. Supp. 331, 338, n. 5 (D. Conn. 1967); *State Depart. of Health and Rehabilitation Services* v. *Zarate,* 407 U.S. 918 (1972), affirming 347 F. Supp. 1004 (S.D. Fla. 1971); *Wyman* v. *Bowens,* 397 U.S. 49 (1970), affirming, 304 F. Supp. 717 (S.D. N.Y. 1969) (order at CCH Poverty Law Rep. ¶10,506 [1968-1971 Transfer Binder]).



the Court had, without discussion of the sovereign immunity question, affirmed monetary awards against states for violating the Fourteenth Amendment. But the cases disapproved, although involving substantive violations of the Fourteenth Amendment, did not arise under a statute wherein Congress had conferred jurisdiction over actions for monetary relief against the states. On the contrary, each arose under 42 U.S.C. §1983, a statute which does not authorize suits against the states themselves.[26] The Court in *Edelman* declared the *Parden* analysis inapplicable to §1983 actions precisely because "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." 415 U.S. at 672; see also *id.* at 675-677.

***2. The later enactment of the Fourteenth Amendment would, indeed, bring it outside the reach of the Eleventh, even if the Eleventh otherwise precluded federal question actions against states.***

This case is thus the first to present squarely the issue left open in *Ex parte Young* as to the relationship between the Eleventh and Fourteenth Amendments. Here, Congress decided that a private cause of action against the states should be created to implement the Fourteenth Amendment. Even if the Eleventh Amendment deprives Congress of the power to authorize such causes of action to effectuate those provisions of the Constitution which antedated that Amendment, that Amendment cannot restrict Congress' power to

[26] *Cheramie* v. *Tucker,* 493 F.2d 586, 587-588 (5th Cir. 1974); *Meyer* v. *State of New York,* 344 F. Supp. 1377, 1379 (S.D. N.Y. 1971), affirmed, 463 F.2d 424 (2nd Cir. 1972); *Dean Hill Country Club, Inc.* v. *City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967), cert. denied, 389 U.S. 975 (1967); *United States ex rel. Lee* v. *State of Illinois,* 343 F.2d 120 (7th Cir. 1965); *Sires* v. *Cole,* 320 F.2d 877, 879 (9th Cir. 1963). See also *Monroe* v. *Pape,* 365 U.S. 187-192 (1961); *City of Kenosha* v. *Bruno,* 412 U.S. 507, 511-513 (1973); *Edelman* v. *Jordan, supra,* 415 U.S. at 676-677.

create private causes of action against states to implement the later-enacted Fourteenth Amendment, as we now show.

"The true spirit and meaning of the [Reconstruction] Amendments . . . cannot be understood without keeping in view the history of the times when they were adopted. . . ." *Strauder* v. *West Virginia,* 100 U.S. 303, 306 (1880). The nation had just emerged from a civil war, and several states were under military occupation. The "statesmen who had conducted the Federal government in safety through the crisis of the Rebellion . . . passed through Congress the proposition for the 14th Amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies." *Slaughter-House Cases,* 83 U.S. 36, 70-71 (1873).

The Fourteenth Amendment was addressed specifically to the states, and placed limitations upon their freedom to act. Section 1 declared that "no State shall" engage in enumerated acts. Section 5 invested Congress with "power to enforce, by appropriate legislation, the provisions of this article." The Amendment reflected a national judgment that states could be wrongdoers, and that the state courts could not be relied upon to right such wrongs.[27]

In the *Civil Rights Cases,* 109 U.S. 3, 17-18 (1883), the Court described the authority conferred upon Congress by this Amendment:

> This abrogation and denial of rights, *for which the States alone were or could be responsible,* was the great seminal and fundamental wrong which was intended to be remedied. *And the remedy to be provided must necessarily be predicated upon that wrong . . .*

[27] See generally, Flack, *The Adoption of the Fourteenth Amendment* (Johns Hopkins Press, 1907; Peter Smith, 1965).



> . . . [A]ny legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract *and redress* the operation of such prohibited state laws or proceedings of state officers (emphasis added).

In *Ex parte Virginia,* 100 U.S. 339, 347-348 (1880), the Court recognized the breadth of the remedial power conferred upon Congress by Section 5 of the Amendment:

> Were it not for the 5th section of that Amendment, there might be room for argument that the 1st section is only declaratory of the moral duty of the State . . . But the Constitution now expressly gives authority for *congressional interference and compulsion* in the cases embraced within the 14th Amendment. It is but a limited authority, true, extending only to a single class of cases; *but within its limits it is complete* (emphasis added).

Similiarly, in *Virginia* v. *Rives,* 100 U.S. 313, 318 (1880), the Court observed:

> Congress, by virtue of the 5th section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. *The mode of enforcement is left to its discretion* (emphasis added).

The Court recognized that Section 5 of the Amendment transferred from the states to Congress a measure of the sovereignty which the states previously had enjoyed, *Ex parte Virginia, supra,* 100 U.S. at 345:

> [The Reconstruction Amendments] were intended to be, what they really are, limitations on the power of the States and enlargements of the power of Congress. . . . [T]his protection and this guaranty, as the 5th section of the Amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

This Court has long recognized that monetary relief in private causes of action may be essential to cure violations of the Fourteenth Amendment, see, e.g., *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 238-240 (1969), and it has specifically recognized that backpay is critical to the vindication of Title VII's objectives of ending employment discrimination and making whole the victims of such discrimination. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-421 (1975).

In light of the foregoing, it is apparent that the states may not invoke sovereign immunity to resist Congress' creation of private causes of action for comple relief, including back pay, for violations of the Fourteenth Amendment. If Congress' power to enforce the Amendment is to be "complete"; if the "State" is to be made responsible for actions which the Amendment forbids the "State" from performing; if recognition is to be given to the national judgment that federal remedies in federal courts were essential to vindicating the Amendment's objectives, then the conclusion is inevitable that, whatever limitations the Eleventh Amendment may impose upon Congress' power to create causes of action for *other* constitutional violations, those limitations are wholly inapplicable to the power conferred upon Congress by the later-enacted Fourteenth Amendment.



## CONCLUSION

For the reasons set forth above, the decision below, insofar as it found the Eleventh Amendment a barrier to awarding monetary relief, should be reversed.

Respectfully submitted,

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